Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	CG Docket No. 02-278
ccAdvertising	)	
Petition for Expedited Declaratory Ruling	)	
	)	

REPLY COMMENTS OF HYPOTENUSE, INC./SURVEYUSA IN SUPPORT OF PETITION FOR EXPEDITED DECLARATORY RULING

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Hypotenuse, Inc. (d/b/a SurveyUSA) ("SurveyUSA"), by its attorneys, hereby replies to North Dakota's comments ("ND Comments")[1] opposing the Petition for Expedited Declaratory Ruling filed by ccAdvertising d/b/a FreeEats.com Inc. ("Petition"),[2] which requests preemption of North Dakota's prohibitions of the use of autodialers and prerecorded messages as applied to the interstate polling activities described in the Petition. North Dakota's preemption arguments misconstrue the legislative history, congressional intent and text of the Telephone Consumer Protection Act ("TCPA"),[3] as well as the law of preemption. Not only does the TCPA preempt the field with regard to the regulation of interstate political telephone polling, but the challenged North Dakota statute, as applied to interstate polling, also conflicts with the TCPA by obstructing the accomplishment of the congressional goals underlying that statute.

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[1] North Dakota's Comment on FreeEats.com, Inc.'s Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Nov. 8, 2004) ("ND Comments").

[2] FreeEats.com, Inc. d/b/a ccAdvertising Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Sept. 13, 2004) ("Petition").

[3] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 ("TCPA").

Moreover, the Commission has the authority to declare that its regulations, and exemptions therefrom, implementing the TCPA are in conflict with and thus must preempt the North Dakota prohibitions as applied to interstate polling calls. The Commission should therefore grant the Petition and preempt Section 51-28-02 of the North Dakota Century Code as applied to the use of automatic telephone dialing systems or prerecorded voice messages in connection with interstate political polling and turn-out-the-vote calls and any other interstate calls that fall within exemptions adopted by the Commission.

I. INTRODUCTION AND SUMMARY

SurveyUSA conducts opinion polling and market research by using autodialers to initiate telephone calls with prerecorded messages with which the called party may interact by pressing the appropriate dialing button on his or her telephone. Topics addressed in such public opinion polls may include election projections, opinion on public policy issues, and/or opinion on specific breaking news stories. None of SurveyUSA's calls are placed for the purpose of commercial or political solicitation, no solicitation takes place during any of its calls, and no respondents are ever re-contacted for the purpose of selling any products or services. SurveyUSA thus has a strong interest in a rational, uniform regulatory regime with regard to interstate telephone polling activities.

In passing the TCPA, Congress sought to create a uniform scheme regulating interstate and intrastate telemarketing and polling that would protect consumers' privacy rights. This scheme included prohibitions against the use of autodialers and artificial or prerecorded voice messages. Congress, however, recognized that its telemarketing restrictions could infringe upon legitimate business practices and non-commercial surveys and authorized the Commission to exempt certain types of calls from the TCPA. Under this authority, the Commission concluded that calls not made for commercial purposes, such as calls made for research, market surveys,

and political polling, are exempt from the TCPA's restrictions.

North Dakota seeks to apply a more restrictive state statute that prohibits, other than in situations not relevant here, all calls using autodialers and artificial or prerecorded voice messages, including those made for research, market survey and political polling purposes, to North Dakota residents, even if those calls originate from outside the state. North Dakota erroneously argues that the TCPA's savings clause, which preserves the ability of the states to impose more restrictive intrastate telemarketing requirements, applies to both *intrastate and interstate* calls. Such a result, however, contradicts Congress' and the Commission's intent to implement uniform telemarketing and telephone polling requirements by subjecting interstate telemarketing and polling calls to multiple, conflicting regulations. Furthermore, North Dakota's interpretation of the savings clause is clearly invalid upon examination of the overall regulatory scheme of the TCPA.

North Dakota's refusal to acknowledge that the TCPA and the Commission's telemarketing rules preempt state regulation of interstate telemarketing calls flies in the face of the legislative history, congressional intent and text of the TCPA and well established federal preemption law. In this case, it is clear that Congress intended the federal government to occupy the field of regulation of interstate telemarketing and use of autodialers and prerecorded messages, preempting states from applying different state regulations to interstate practices. Furthermore, allowing North Dakota to apply its more restrictive statute to interstate calls would lead to conflicting state and federal regulations and a myriad of inconsistent enforcement actions. Such a result would significantly impede Congress' stated objectives in enacting the TCPA, including its intention to authorize the Commission to determine whether certain types of calls should be exempted from the TCPA's restrictions.

Irrespective of whether Congress, through the TCPA, preempted the application of inconsistent and conflicting state restrictions to interstate telemarketing and telephone polling practices, the Commission may still preempt North Dakota's telemarketing statute. It is well established that an agency, as long as it is acting within its authority, may preempt state regulation. In this case, the Commission has such authority. Thus, a decision by the Commission to preempt the application of more restrictive state regulations to interstate polling calls would be upheld.

II. BACKGROUND

A. The Legislative History, Preamble and Text of the TCPA Demonstrate Congress' Intent To Establish A Comprehensive, Uniform Scheme For Interstate Telemarketing And Non-Commercial Telephone Polling

North Dakota ignores the clear expression of Congressional intent in the legislative history of, and preamble to, the TCPA. Congress passed the TCPA in order "to promote a uniform regulatory scheme" governing interstate and a significant portion of intrastate telemarketing and non-commercial telephone surveys.[4] Congress recognized both the need to protect consumers' privacy from "the proliferation of intrusive, nuisance calls" and the need for "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade [to] be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[5] Congress also noted the variety of state regulation of telemarketing and the need for federal control of telemarketing practices[6] and amended Section 2(b) of the

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[4] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14064 (2003) ("*2003 Order*").

[5] TCPA § 2(6), (9).

[6] *Id.* § 2(7).

Communications Act for the express purpose of giving the Commission authority over both interstate and intrastate telemarketing calls under the TCPA.[7] The need for uniformity and the balancing of consumers' privacy and legitimate practices is highlighted in Congress' finding that

> [T]he [Commission] should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the ... First Amendment....[8]

As codified in Section 227 of the Communications Act, the TCPA sets forth a comprehensive scheme over all aspects of telemarketing and non-commercial telephone polling. The TCPA generally prohibits making calls using autodialers[9] or an artificial or prerecorded voice to emergency telephone lines, patient rooms at health care facilities or to wireless telephones, subject to certain narrow exceptions.[10] The TCPA also prohibits the initiation of any non-emergency telephone call "to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, *unless* the call is ... exempted by [Commission] rule or order."[11] Under the Commission's rules, calls that are not

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[7] *Id.* § 3(b). *See also* 47 U.S.C. § 152(b) (exempting the provisions of the TCPA from the general limitation of the Commission's authority to interstate telecommunications).

[8] TCPA § 2(13).

[9] The TCPA and Commission rules define "automatic telephone dialing system" (or "autodialer") as a device having the "capacity - (A) to store or produce telephone numbers to be called[] using a random or sequential number generator; and (B) to dial such numbers." *See* 47 U.S.C. § 227(a)(1) (1999) and 47 C.F.R. § 64.1200(f)(1). *See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8755 (1992) ("*TCPA Order*"), *recon. granted in part and denied in part*, 10 FCC Rcd 12391 (1995) (using the term "autodialer").

[10] 47 U.S.C. § 227(b)(1)(A).

[11] *Id.* § 227(b)(1)(B) (1999) and 47 C.F.R. § 64.1200(a)(2) (emphasis added).

made for commercial purposes are exempt from this prohibition.[12] Further, in adopting this exemption, the Commission concluded that such non-commercial calls include "calls conducting research, market surveys, political polling or similar activities," provided that such calls do not involve solicitation and the called party is not charged for the call.[13]

The TCPA directs the Commission to prescribe regulations implementing its provisions, including specific technical and procedural standards and the protection of subscribers' privacy rights.[14] In addition, the TCPA provides for private rights of action as well as civil suits by state agencies for violations of certain substantive provisions of the statute.[15] The TCPA also includes a savings clause that preserves state laws governing intrastate telemarketing practices.[16]

The Commission, which has the exclusive responsibility for implementing the TCPA, adopted regulations in its 1992 *TCPA Order* that exempted *all* calls made for the purpose of "conducting research, market surveys, political polling or similar activities which do not involve solicitation...."[17] The Commission revised its TCPA rules in July 2003 and adopted new rules to provide consumers with several options for avoiding unwanted telephone solicitations, including

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[12] *See* 47 C.F.R. § 64.1200(c).

[13] *TCPA Order*, 7 FCC Rcd at 8774. The TCPA also prohibits using autodialers if such use simultaneously engages two telephone lines of a multi-line business and sending unsolicited advertisements to fax machines. 47 U.S.C. §§ 227(b)(1)(C), (D).

[14] 47 U.S.C. §§ 227(b)(2), (c), (d).

[15] *Id.* §§ 227(b)(3), (f).

[16] *Id.* § 227(e).

[17] *TCPA Order*, 7 FCC Rcd at 8753, 8774. Accordingly, the Commission "reject[ed] as unnecessary the proposal to create specific exemptions for such activities." *Id.* at 8774. *See* H.R. Rep. No. 102-317 at 13 ("[T]he Committee does not intend the term 'telephone solicitation' to include public opinion polling, consumer or market surveys, or other survey research conducted by telephone.")

a national Do-Not-Call ("DNC") registry to be maintained by the Federal Trade Commission. In the *2003 Order*, the Commission reaffirmed that, in its *TCPA Order*, it "determined to exempt calls that are non-commercial and commercial calls that do not contain an unsolicited advertisement, noting that messages that do not seek to sell a product or service do not tread heavily upon the consumer interests implicated by section 227."[18] Thus, "calls that do not fall within the definition of 'telephone solicitation' as defined in section 227(a)(3) [of the TCPA] will not be precluded by the national do-not-call list. These may include surveys, market research, political or religious speech calls."[19]

In the *2003 Order*, the Commission also explained the rationale for prohibiting the use of autodialers only with respect to a particular class of calls.

> The legislative history also suggests that through the TCPA, Congress was attempting to alleviate a particular problem - an increasing number of automated and prerecorded calls to certain categories of numbers. The TCPA does not ban the use of technologies to dial telephone numbers. It merely prohibits such technologies from dialing emergency numbers, health care facilities, telephone numbers assigned to wireless services, and any other numbers for which the consumer is charged for the call. Such practices were determined to threaten public safety and inappropriately shift marketing costs from sellers to consumers.[20]

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[18] *2003 Order*, 18 FCC Rcd at 14095.

[19] *Id.* at 14039-40 (emphasis added).

[20] *Id.* at 14092 (citations omitted). In the *2003 Order*, the Commission also updated the prohibition against using automatic telephone dialing systems by clarifying that the use of so-called "predictive" dialers qualify as automatic telephone systems. The Commission defined predictive dialers as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls." *Id.* at 14091.

B. The Savings Clause In The TCPA Does Not Undermine The Uniformity Of The Scheme Established By The TCPA For Interstate Non-Commercial Polling

The TCPA's savings clause preserves the ability of states to impose more restrictive intrastate requirements, including prohibitions, on telemarketing or the use of automatic dialing systems or prerecorded voice messages.[21] The Commission addressed jurisdictional issues in the *2003 Order* and noted that while the savings clause permits the states to adopt more restrictive regulations or requirements with respect to *intrastate* telemarketing calls, the United States Congress did not intend to subject *interstate* telemarketers to "multiple, conflicting regulations."[22] The Commission observed in this connection that the main area of difference between the state do-not-call programs and the federal program relates to the exemptions created under the various state regulatory schemes, some of which are less restrictive than the federal scheme and some of which are more restrictive than the federal scheme.

With respect to states that have adopted DNC regulations, the Commission clarified the interplay between the federal and state regulations. First, the Commission clarified that the federal rules "constitute a floor, and therefore would supersede all less restrictive state do-not-

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[21] The savings clause states:

> [N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits -
> ....
> (B) the use of automatic telephone dialing systems;
> (C) the use of artificial or prerecorded voice messages; or
> (D) the making of telephone solicitations.

47 U.S.C. § 227(e)(1). There are exceptions to the savings clause which are not relevant here. *Id.*

[22] *2003 Order*, 18 FCC Rcd at 14064 (emphasis added).

call rules."[23] The Commission added that the TCPA applies to both intrastate and interstate communications and, thus, "telemarketers must comply with the federal do-not-call rules even if the state in which they are telemarketing has adopted an otherwise applicable exemption."[24] The Commission further concluded that "inconsistent *interstate* rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion."[25] "We therefore believe that any state regulation of *interstate* telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted."[26] Thus, the Commission stated that it "will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis" and invited parties to seek a declaratory ruling in the case of such inconsistency. "We reiterate the interest in uniformity - as recognized by Congress - and encourage states to avoid subjecting telemarketers to inconsistent rules."[27]

C. The North Dakota Statute Conflicts With The TCPA

Section 51-28-02 of the North Dakota Century Code provides:

> **Use of prerecorded or synthesized voice messages.** A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to messages from

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[23] *Id.* at 14063 (citation omitted).

[24] *Id.*

[25] *Id.* at 14064 (emphasis added).

[26] *Id.* (emphasis added).

[27] *Id.* at 14064-65.

> school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules.[28]

"Caller" is defined for purposes of this prohibition as any "person, corporation ... or legal or commercial entity that attempts to contact, or that contacts, a subscriber in this state by using a telephone or telephone line."[29]

The North Dakota statute conflicts with the TCPA and regulations promulgated thereunder in two ways -- by broadly prohibiting the use of autodialed calls for purposes that are permitted under the TCPA and its implementing regulations and by declining to recognize the exemption authorized by the TCPA for non-commercial calls from the prohibition on the use of prerecorded messages. According to the Petition, the office of the Attorney General of North Dakota has notified Petitioner of its intention to take enforcement action against Petitioner's interstate political polling calls to recipients in North Dakota based on Section 51-28-02. SurveyUSA has an interest in this proceeding because its interstate polling activities, which rely on autodialers to conduct polling using prerecorded messages, are similarly vulnerable to enforcement action under the same provision.

III. THE COMMISSION SHOULD GRANT THE PETITION

A. The TCPA Occupies The Field With Respect To Interstate Telephone Polling

In the absence of a specific statutory provision preempting state law, courts will nonetheless infer complete preemption where state law seeks to assert its authority "in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the

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[28] N.D. Cent. Code § 51-28-02.

[29] *Id.* § 51-28-01(2).

inference that Congress left no room for the States to supplement it.'"[30] In such a case, the remaining issue to be decided is the scope of the preempted field.[31] Here, the legislative history, preamble and text of Section 227 leave no doubt that Congress intended the federal government to occupy the field of interstate telemarketing and telephone polling regulation.

Even prior to passage of the TCPA, interstate communications were "totally entrusted to the FCC."[32] "The effect of the [Communications Act] is to bring all interstate communications under [its] coverage to the exclusion of local statutes or decisions."[33] At that time, "[o]nly Section 2(b)(1) of the Act limit[ed] the authority of the Commission, and that section reserve[d] to the state authority over intrastate communications, not interstate communications."[34]

In drafting the TCPA, Congress aggressively expanded the jurisdiction of the Commission with respect to telemarketing practices to cover even intrastate calls previously fenced off from Commission authority by Section 2(b)(1). In doing so, Congress took note of the absence of state jurisdiction over interstate calls.[35] In introducing the Senate bill that became

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[30] *English v. Gen. Elec. Co.*, 496 U.S. 72, 79-80 (1990) (citations omitted) ("*English*").

[31] *Id.* at 82 (Congress "occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states," quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 212 (1983)).

[32] *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

[33] *Vaigneur v. Western Union Telegraph Co.*, 34 F. Supp. 92, 93 (E.D. Tenn. 1940) ("*Vaigneur*"). *See also AT&T and the Associated Bell System Cos.*, 56 FCC 2d 14, 20 (1975), *aff'd California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978) ("The States do not have jurisdiction over interstate communications.").

[34] *Operator Services Providers of America*, 6 FCC Rcd 4475, 4477 (1991) ("*OSPA*").

[35] *See* S. Rep. No. 102-178, at 5, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1973 ("Federal action is necessary because States do not have jurisdiction to protect their citizens against those who ... place interstate telephone calls.") ("S. Report"); TCPA § 2(7) ("over half the States now

(Footnote continues on next page.)

the TCPA, Senator Hollings (R.-S.C.) pointed out that "State law does not, and cannot, regulate interstate calls. Only Congress can protect citizens from telephone calls that cross State boundaries."[36] Congress also noted the variety of state regulation of telemarketing[37] and the need for regulatory uniformity.[38] Congress recognized that those concerns required "Federal law ... to control residential telemarketing practices."[39] Congress perceived such a great need for uniformity that it drew no general limitations in the jurisdictional coverage of Section 227, covering both intrastate and interstate telemarketing.[40] Moreover, Congress underscored the global reach of the TCPA by amending Section 2(b)(1) to make an exception for Section 227.[41]

Congress provided for "Federal ... control" over telemarketing practices by enacting a comprehensive framework covering interstate and intrastate calls. In addition to the areas relevant to the North Dakota statute at issue here, Section 227 also restricts the use of facsimile machines to send advertisements. Section 227 provides both a broad range of substantive

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(Footnote continued from previous page.)

have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation.").

[36] 137 Cong. Rec. S16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings)

[37] TCPA § 2(7).

[38] *See* H.R. Rep. No. 101-633, at 3 (July 27, 1990) (House bill "is an attempt to resolve the patchwork of intrastate and interstate regulation. ... by establishing a single set of rules to guide telemarketers."); 137 Cong. Rec. S18785 (daily ed. Nov. 27, 1991) (statement of Sen. Pressler) ("The Federal Government needs to act now on uniform legislation to protect consumers.").

[39] TCPA § 2(7).

[40] *See, e.g.,* 47 U.S.C. § 227(b)(1)(A) (prohibiting "any call" using an automatic dialer to certain categories of recipients).

[41] TCPA § 3(b). *See also* 47 U.S.C. § 152(b) (excluding the provisions of the TCPA from the general limitation of the Commission's authority to interstate telecommunications).

restrictions and technical requirements with regard to the use of automatic dialers, prerecorded messages and facsimile machines and authorizes the Commission to prescribe regulations implementing those restrictions as well as to exempt non-commercial calls from the restrictions.

The preamble to the TCPA makes it clear that Congress authorized the Commission to promulgate implementing regulations and to consider certain categories of exemptions therefrom in order to give the Commission "the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the ... First Amendment...."[42] Thus, the Commission was delegated Congress' goal of "balanc[ing]" "[i]ndividuals' privacy rights [and] public safety interests" against "commercial freedoms of speech and trade."[43] The broad range of activities and restrictions included in the TCPA, Congress' goal of creating a comprehensive solution to the states' inability to regulate interstate telemarketing calls and the mandate to the Commission to balance all of the relevant factors demonstrate congressional intent to impose "Federal ... control" over interstate telemarketing to the exclusion of differing state requirements.[44] The TCPA thus constitutes "a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" at least as to interstate calls.[45]

The Commission staff reached a similar decision, in responding to a request for clarification submitted by the Maryland House of Delegates, by advising that body that

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[42] TCPA § 2(13).

[43] *Id.* § 2(9).

[44] *Id.* § 2(7).

[45] *English*, 496 U.S. at 79-80.

> Under the Supremacy Clause, a state may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation. ... Section 2(a) of the [Communications] Act grants the Commission jurisdiction over all interstate ... communications. ...
>
> The Communications Act, specifically section 227 ... establishes Congress' intent to provide for regulation exclusively by the Commission of the use of the interstate telephone network for unsolicited advertisements by ... telephone utilizing ... autodialers, or prerecorded messages. ...
>
> In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however, precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland can not apply its statutes to calls that are received in Maryland and originate in another state or calls that originate in Maryland and are received in another state.[46]

The Commission therefore should find that N.D. Cent. Code § 51-28-02 is preempted by the TCPA, which occupies the field of regulating interstate telemarketing and non-commercial polling.

B. The North Dakota Statute Should Be Preempted Because It Conflicts With The TCPA

Moreover, N.D. Cent. Code § 51-28-02 directly conflicts with the TCPA because its enforcement as to interstate calls "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the TCPA.[47] An independent supplemental enforcement system as to interstate non-commercial polling calls under state law would inevitably lead to conflicting requirements for such calls. To permit such a confusing

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[46] Letter from Geraldine A. Matise, FCC, to Delegate Ronald A. Guns, Maryland House of Delegates at 1-3 (Jan. 26, 1998), attached hereto.

[47] *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) ("*Geier*").

welter of enforcement actions "would result in the application of fifty bodies of law."[48] Thus, any supplemental enforcement system would lead to inconsistent telemarketing and non-commercial polling requirements nationwide.

Such localized variations would stand as a substantial obstacle to the achievement of Congress' objectives in enacting the TCPA. In particular, the patchwork regulation of non-commercial interstate polling that would result from a parallel state law enforcement system would upset the "balance[]" that Congress expressly authorized the Commission, and only the Commission, to strike between consumers' privacy rights and the needs of legitimate polling and other non-commercial calling.[49] North Dakota argues that Section 51-28-02 does not conflict with the TCPA because a polling firm can obey both sets of requirements.[50] North Dakota ignores, however, that polling firms can conform to both sets of requirements only by giving up the federally recognized right to use autodialers and prerecorded messages when making interstate polling calls to residents of North Dakota.

North Dakota also fails to understand that different state laws regarding interstate non-commercial calling conflict with the legislative goal of a uniform balancing of the affected interests. In *Geier*, the Supreme Court held that a state claim that would have imposed a duty to install airbags in new automobiles "would have presented an obstacle to the variety and mix of [safety] devices" and the "gradual passive restraint phase-in" required by federal regulations.[51] The Court held that "[b]ecause the [state] rule of law ... would have stood 'as an obstacle to the

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[48] *Boomer v. AT&T Corp.*, 309 F.3d 404, 418 (7th Cir. 2002).

[49] TCPA § 2(9).

[50] ND Comments at 30-32.

[51] *Geier*, 529 U.S. at 881.

accomplishment and execution of' ... important ... federal objectives ... it is pre-empted."[52] Similarly, Section 51-28-02 is an "obstacle to the accomplishment" of the uniform balancing of interests that the TCPA entrusted to the Commission.

North Dakota argues that the North Dakota statute does not stand as an obstacle to the accomplishment of Congress' full purposes, citing *Liberty National* for the proposition that where the federal and state laws both have the same objective, the laws complement, rather than conflict with, one another.[53] In that case, however, there was no congressional expression of an intent to establish a comprehensive, uniform regime either striking a balance, or under which a federal agency would be authorized to strike a balance, among all of the relevant interests. In the absence of such congressional intent, varying state laws do not upset a uniform balance and thus do not obstruct the accomplishment of Congress' goals. In the case of the TCPA, however, particularly the exemptions that the Commission was authorized to establish, varying state laws conflicting with the exemptions established by the Commission for interstate telephone polling do upset the balance that Congress directed the Commission to determine and thus obstruct congressional goals.

North Dakota stresses that, although the Commission stated that any inconsistent state regulation of *interstate* telemarketing "almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted,"[54] neither Congress, in enacting the

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[52] *Id.* (citations omitted).

[53] *State v. Liberty Nat'l Bank & Trust Co.*, 427 N.W.2d 307 (N.D. Sup. Ct.), *cert. denied*, 488 U.S. 956 (1988), discussed in ND Comments at 31-32.

[54] *2003 Order*, 18 FCC Rcd at 14064 (emphasis added).

TCPA, nor the Commission unequivocally preempted inconsistent state rules.[55] As the *Geier* Court pointed out, however,

> [C]onflict pre-emption ... turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent. ... [T]his Court traditionally distinguishes between 'express' and 'implied' pre-emptive intent, and treats 'conflict' pre-emption as an instance of the latter. ... [T]he Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists.[56]

Thus, it is irrelevant, for conflict preemption purposes, that the Commission has not already made a definitive statement that it is preempting more restrictive state rules regarding interstate non-commercial polling calls.

C. *OSPA* Demonstrates That Both Types Of Preemption Apply Here

An illustration of both types of preemption is found in the *Operator Service Providers of America* order ("*OSPA*"), which addressed a similar consumer protection provision of the Communications Act, the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), codified at Section 226 of the Act.[57] In a detailed opinion, the Commission addressed the "call branding" and rate disclosure requirements imposed on operator service providers ("OSPs") by TOCSIA and its implementing regulations and found that they completely preempted any state law seeking to regulate OSPs.

The Commission first considered whether TOCSIA constitutes "a field that Congress intended the Federal Government to occupy exclusively," and concluded that it did: "TOCSIA .

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[55] ND Comments at 16-17, 20-21.

[56] *Geier*, 529 U.S. at 884.

[57] 47 U.S.C. § 226.

. . establish[es] Congress' intent to have this Commission exclusively regulate the rates, terms and conditions of interstate operator services."[58] As the Commission explained,

> TOCSIA and its legislative history make clear that Congress viewed TOCSIA as establishing a "regulatory framework" for the interstate operator services industry, and as filling a need for comprehensive solutions that it believed the Commission's previous proceedings had failed to provide. . . . [T]o implement this framework, the statute establishes a broad range of requirements governing the industry, . . . and directs the Commission to conduct a "general" rulemaking to establish rules that will protect consumers from unfair and deceptive practices in their use of operator services to place interstate telephone calls.[59]

The Commission concluded that "[i]t is apparent that Congress intended to, and did, create *a comprehensive legislative solution to any problems in the interstate OSP industry -- a federal solution that precludes a potpourri of differing state requirements applicable to interstate services.*"[60] Accordingly, the Commission concluded, "under the regulatory framework established by Congress in TOCSIA, the [state law] may not apply to interstate operator services."[61] Similarly, the TCPA creates "a comprehensive legislative solution ... that precludes a potpourri of differing state requirements applicable to interstate" polling calls.

The Commission also found that state law that "establish[es] requirements in the areas of call branding[] and rate disclosure different from those in TOCSIA" would "undercut[] the goal of TOCSIA," because, *inter alia*, any such state regulation that was *"more burdensome than federal requirements" would "make impossible achieving the balance established by Congress*

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[58] *OSPA*, 6 FCC Rcd at 4476.

[59] *Id.* at 4477 (citations omitted).

[60] *Id.* (emphasis added).

[61] *Id.* at 4478

between the degree of regulation and reliance on marketplace forces for interstate OSPs."[62] Similarly, in the context of the TCPA, enforcement of the more restrictive Section 51-28-02 and other similar restrictions would "make impossible achieving the balance established by Congress" in delegating to the Commission the decision as to how best to treat non-commercial polling calls in "balanc[ing]" "privacy rights [and] public safety interests" against "commercial freedoms of speech and trade."[63]

D. Irrespective Of Whether Congress Has Preempted Inconsistent State Rules, The Commission, Acting Within Its Authority, May Do So Now

Ultimately, most of North Dakota's opposition to preemption is beside the point. Irrespective of whether Congress has preempted inconsistent state telemarketing rules, such as Section 51-28-02, the Commission may do so in response to the Petition, as long as it is acting within its authority. As the Supreme Court explained in *City of New York*:[64]

> The phrase "Laws of the United States" [in the Supremacy Clause] encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, ... we have ... recognized that "*a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation*" and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.
>
> ... [T]he inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has properly exercised the legislative power. ... The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances *the agency may determine that its authority is*

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[62] *Id.*

[63] TCPA § 2(9).

[64] *City of New York v. FCC*, 486 U.S. 57 (1988) ("*City of New York*").

> *exclusive and pre-empts any state efforts to regulate in the forbidden areas.*[65]

North Dakota has not claimed, nor could it, that the Commission has acted improperly or outside its authority in exempting non-commercial interstate polling calls from the restrictions of the TCPA. It is therefore fully within the Commission's power to declare "that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden areas." Moreover,

> It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[66]

Here, of course, Congress expressly invited the Commission to "reconcile conflicting policies" by exempting non-commercial calls from the restrictions of the TCPA. Given the congressional goal of imposing "Federal law ... to control residential telemarketing practices" and its direction to the Commission to "balance[]" the relevant interests by, *inter alia*, "design[ing] different rules for ... noncommercial calls," a decision by the Commission to preempt more restrictive state

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[65] *Id.* at 63-64 (citations omitted) (emphasis added).

[66] *Id.* at 64 (citations omitted). *See also Southwestern Bell Wireless Inc. v. Board of County Comm'rs,* 17 F. Supp.2d 1221, 1224-25 (D. Kan. 1998), *aff'd*, 199 F.3d 1184 (10th Cir. 1999) (finding local zoning ordinance concerning communications towers and antennae preempted by the Communications Act and the Commission's wireless regulations, citing *City of New York*).

laws regarding non-commercial interstate calls therefore would certainly be upheld.[67] The Commission accordingly should grant the Petition.[68]

E. The Savings Clause Does Not Alter The Preemption Analysis

North Dakota relies on the savings clause in Section 227 to backstop its argument. It reads the clause to preserve any state restrictions on interstate or intrastate calls involving the use of automatic dialers, prerecorded messages or any telephone solicitations. North Dakota's reading is impossible under any approach to statutory construction. That provision states, in relevant part:

> STATE LAW NOT PREEMPTED. - Except for [enumerated technical standards], ... nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits -
> ....
> (B) the use of automatic telephone dialing systems;
> (C) the use of artificial or prerecorded voice messages; or
> (D) the making of telephone solicitations.[69]

North Dakota argues that this provision addresses two categories of state regulation: (1) "any State law that imposes more restrictive intrastate requirements or regulations on" the enumerated activities; and (2) "any State law ... which prohibits" the enumerated activities.

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[67] TCPA § 2(7), (9), (13).

[68] North Dakota cites *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) ("*Hillsborough*"), for the proposition that, given the level of detail in most agency regulations, preemption should not be assumed simply on the basis of a comprehensive agency response to an issue. ND Comments at 14. There, however, the party claiming preemption based its entire case on Food &Drug Administration ("FDA") regulations, rather than claiming that preemption could be inferred at least partly from the relevant federal statutes, and the FDA had announced that it was not trying to preempt state or local authority. *Hillsborough*, 471 U.S. at 714-15 & n.2.

[69] 47 U.S.C. § 227(e)(1).

Thus, under North Dakota's reading, the term "intrastate" qualifies only the "more restrictive ... requirements or regulations" that a state may impose on the enumerated types of calls and not the outright "prohibit[ions]" that a state may also impose. Because states may ban the three enumerated types of calls, which North Dakota argues include interstate polling calls using automatic dialers and/or prerecorded messages, North Dakota concludes that they may also impose any lesser restrictions on those types of calls.[70]

North Dakota's interpretation rests on an incorrect, implicit assumption. A state law savings clause can "save" only the jurisdiction that the states already possess. As detailed above, Section 152 of the Act and the case law addressing communications jurisdictional issues demonstrate that the states have no jurisdiction over interstate communications.[71] In enacting the TCPA, Congress understood that the states had no jurisdiction over interstate telemarketing or interstate telephone polling.[72] Because the savings clause of the TCPA does not purport to enlarge the states' jurisdiction, it cannot be read to "save" the states' nonexistent authority to regulate interstate telemarketing or interstate telephone polling.

North Dakota's reading also is rebutted by the canons of statutory construction. A statute must be interpreted in the context of the overall regulatory scheme. Courts have rejected literal readings of even facially clear provisions when such readings "would 'compel an odd result'" conflicting with the underlying legislative objectives or policies.[73] In enacting the TCPA,

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[70] ND Comments at 17-20.

[71] *See, e.g., Vaigneur*, 34 F. Supp. at 93.

[72] *See, e.g.*, S. Report at 5.

[73] *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) (quoting *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989)).

Congress intended to impose "Federal law," at least as to interstate telemarketing and polling calls, because the states have no authority over interstate calls.[74] Congress also directed the Commission to strike the appropriate "balance[]" among all of the relevant interests in promulgating implementing regulations and exemptions.[75] In light of this clear legislative goal of federalizing the regulation of telemarketing and polling calls, North Dakota does not explain why Congress would completely negate the core of the TCPA by preserving state regulation of interstate telemarketing and polling calls using automatic dialers and prerecorded messages. North Dakota's reading also is undermined by Congress' view that the states have no jurisdiction over interstate calls, an understanding that is entirely inconsistent with a congressional intent to preserve state authority over interstate telemarketing and polling calls.

North Dakota's reading also renders superfluous the portion of the savings clause that preserves any state law that "imposes more restrictive intrastate requirements or regulations on" the enumerated types of calls. If, as North Dakota argues, a state may prohibit all such calls altogether, interstate as well as intrastate, and such authority subsumes any lesser restrictions on all such calls, North Dakota has not explained what is added by the phrase preserving "more restrictive intrastate requirements or regulations." Any state law falling within the scope of the quoted phrase would be entirely subsumed within the absolute prohibition. It is a central canon of construction that

> [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void

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[74] TCPA § 2(7).

[75] *Id.* § 2(9), (13).

> or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.[76]

North Dakota's reading of the savings clause must therefore be rejected.

A more realistic interpretation that gives effect to the entire provision is one in which the phrase "or which prohibits" simply completes the phrase "imposes more restrictive ... requirements or regulations on," and is also modified by the term "intrastate." That reading, although grammatically imprecise, makes use of every word in the clause. It makes clear that the entire range of state regulation of intrastate telemarketing and polling calls is preserved, from minor restrictions to outright bans.

An interpretation under which only intrastate requirements are preserved is also consistent with the underlying statutory context. The purpose of the savings clause can be understood only in light of the unusual expansion of the Commission's authority in the TCPA to cover intrastate as well as interstate telemarketing and polling calls.[77] That expansion necessitated a specific carve-out from the Commission's jurisdiction over intrastate calls conferred by the TCPA where states have acted to impose more restrictive requirements governing intrastate telemarketing and polling calls.[78] Thus, the TCPA's provisions cover all interstate telemarketing and polling calls but cover intrastate calls only where states have not imposed their own requirements or imposed less restrictive requirements.[79] Interpreting the

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[76] 2A Sutherland Stat. Const. § 46.06 at 119-20 (5th Ed.).

[77] *See also Minnesota v. Sunbelt Communications and Marketing*, 282 F. Supp.2d 976, 984 (D. Minn. 2002) (concluding that the TCPA "extends to intrastate, as well as interstate, communications.").

[78] *See* TCPA § 2(7) (noting that over half the states regulate telemarketing but do not have jurisdiction over interstate calls).

[79] *2003 Order*, 18 FCC Rcd at 14063-64.

savings clause to preserve more restrictive state rules regarding only intrastate calls therefore gives effect to the entire clause and completes a coherent statutory scheme, unlike North Dakota's reading, which renders part of the clause superfluous while destroying much of the scheme created by the other provisions of the TCPA.[80]

Interpreting the savings clause to preserve only state rules governing intrastate calls also conforms to the Supreme Court's practice denying "broad effect to saving clauses where [giving a broad effect] would upset the careful regulatory scheme established by federal law."[81] Under North Dakota's approach, the comprehensive uniform scheme established by the TCPA to submit interstate and intrastate telemarketing and polling calls to "Federal law" may be displaced by 50 different interstate schemes striking a different "balance[]" among the relevant interests from the balance that Congress authorized only the Commission to determine.[82] North Dakota's interpretation thus "reads into [the TCPA] toleration of a conflict that [ordinary preemption] principles would otherwise forbid," and thereby "permits [the TCPA] to defeat its own

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[80] North Dakota loses the argument even under a literal reading of the savings clause. Section 51-28-02 does not entirely "prohibit" the use of automatic dialers or prerecorded messages, as it permits such calls by school districts, persons with whom the call recipient has a current business relationship and employers advising employees of work schedules. Section 51-28-02 therefore "imposes more restrictive ... requirements or regulations on" the enumerated classes of calls, rather than prohibiting them altogether. Section 51-28-02 accordingly is preserved against preemption only insofar as it covers "intrastate" calls. 47 U.S.C. § 227(e)(1). North Dakota implicitly recognizes this problem by arguing that the authority to prohibit subsumes any lesser restrictions, but that response simply underscores the fundamental flaw in its approach, namely, that its reading renders part of the savings clause superfluous.

[81] *Geier*, 529 U.S. at 870 (citation omitted).

[82] TCPA § 2(7), (9).

objectives, or potentially ... to 'destroy itself.'"[83] "[T]here is no reason to believe Congress has" enacted such a self-destructive statute here.[84]

Finally, interpreting the savings clause to preserve only state rules governing intrastate calls is also consistent with congressional intent, as expressed in the legislative history. In reporting on the amended version of S. 1462, which became the TCPA, Senator Hollings stated:

> Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to [certain] technical standards.... *Pursuant to the general preemptive effect of the Communications Act ... State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.*[85]

North Dakota relies heavily on a case that touches on a number of preemption issues and the TCPA savings clause. In *Van Bergen*,[86] a politician sought a permanent injunction and declaratory relief against the enforcement of a Minnesota statute regulating the use of automatic dialers to disseminate prerecorded messages. He had intended to use automatic dialer calls to reach potential voters. He argued that because the Minnesota statute is "less restrictive" than the TCPA, it is preempted by the TCPA.[87] The court rejected his claim based on the TCPA savings clause and the absence of a congressional intent to preempt inconsistent state rules.

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[83] *Geier*, 529 U.S. at 872 (citations omitted).

[84] *Id.*

[85] 137 Cong. Rec. S18784 (daily ed. Nov. 27, 1991) (statement of Sen. Hollings).

[86] *Van Bergen v. State of Minnesota*, 59 F.3d 1541 (8th Cir. 1995) ("*Van Bergen*").

[87] It is not clear from the opinion what plaintiff's interest would be in being subjected to a more restrictive federal law. It seems more likely that he recognized that, in fact, the Minnesota law is more restrictive but was hoping to avoid the effect of the savings clause by seizing on one aspect of the Minnesota law that was less restrictive (exempting callers with a prior personal or business relationship from the restrictions on autodialer calls; *see Van Bergen*, 59 F.3d at 1548). As explained in the text, the court rejected his argument about the effect of the savings clause.

First, the court held that, because the savings clause explicitly preserves "more restrictive intrastate requirements," but says nothing about less restrictive requirements, there is no express preemption.[88] North Dakota apparently did not notice that the court in *Van Bergen* thus read the savings clause to preserve from preemption only state rules covering intrastate calls, directly contrary to North Dakota's interpretation. Second, although the court correctly noted that an implied preemption can be found "without an express statement," it found no implied preemption by the TCPA because the savings clause failed to include an express preemption.[89]

Third, the court held that Congress did not intend to occupy the field or promote national uniformity because the TCPA "expressly does not preempt state regulation of intrastate [automatic dialer] calls that differs from federal regulation."[90] The court added that the congressional finding that "Federal law is needed to control" telemarketing because the states lack jurisdiction over interstate calls "suggests that the TCPA was intended not to supplant state law, but to provide interstitial law preventing evasion of state law by calling across state lines."[91]

Although there is no indication in *Van Bergen* as to whether the voter telephoning that the plaintiff intended to conduct involved intrastate or interstate calling, the court's discussion of field preemption only makes sense under the assumption that the calling at issue was intrastate. The court stated that the TCPA does not promote uniformity because the savings clause preserves state regulation of "intrastate ... calls." The uniformity to which the court referred thus could only be uniformity in intrastate requirements. Similarly, *Van Bergen's* conclusion

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[88] *Id.* at 1547-48.

[89] *Id.* at 1548. *See also Geier*, 529 U.S. at 884 (preemption may be express or implied).

[90] *Van Bergen*, 59 F.3d at 1548.

[91] *Id.*

that the TCPA was not intended to "supplant state law" only makes sense if the "state law" at issue refers to rules governing intrastate calling. The court's reference to the congressional finding that "Federal law is needed" because the states lack jurisdiction over interstate calls indicates that the court understood that the TCPA was intended to cover the field of interstate telemarketing and political calling. *Van Bergen* thus says nothing about the present controversy, which concerns the supposed effect of the savings clause on preemption of a state law governing interstate calling. *Van Bergen* may well be correct that Congress did not intend to preempt state rules governing intrastate calling, but that opinion is irrelevant here.

Van Bergen also holds that the differences between the TCPA and the Minnesota law are so insignificant that there is no conflict preemption.[92] That is not the appropriate standard, however, for determining whether there is conflict preemption. Rather, if the proliferation of many inconsistent state requirements would obstruct an important federal policy, courts will find conflict preemption, irrespective of whether one or more state standards happen to resemble the federal scheme.[93]

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[92] *Id.*

[93] *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235-36 (1947) ("Congress in effect said that the policy which it adopted ... was exclusive of all others.... [A licensee] could not be required by a State to ... conform to added regulations, even though they in no way conflicted with what was demanded ... under the Federal Act.").

North Dakota also cites two federal district court cases granting plaintiffs' motions to remand complaints alleging telemarketing violations under state causes of action back to state courts. *See State of North Carolina v. Debt Management Foundation Services, Inc.*, No. 5:03-CV-950-FL(3) (E.D.N.C. Mar. 8, 2004) ("*North Carolina*"); *State of Florida v. Sports Authority Florida, Inc.*, Case No. 6:04-cv-115-Orl-JGG (M.D. Fla. June 4, 2004) ("*Florida*"). Because the standard for showing complete preemption as a basis for federal removal jurisdiction is so much stricter than the standard that must be met to show field preemption in a non-removal context, the findings in those cases that the TCPA does not completely preempt state causes of action has no relevance here. *See Florida*, slip op. at 3-4 (distinguishing between "complete preemption" and "ordinary preemption"). It should be noted, however, that *North Carolina* virtually concedes

(Footnote continues on next page.)

IV. CONCLUSION

The legislative history, preamble and text of the TCPA all demonstrate that the TCPA preempts Section 51-28-02 of the North Dakota Century Code. Moreover, the Commission has the authority to preempt Section 51-28-02 on the basis of the TCPA and its implementing regulations. The Commission therefore should grant the Petition and preempt Section 51-28-02 as applied to the use of autodialers or prerecorded voice messages in connection with interstate political polling and turn-out-the-vote calls and any other interstate calls that fall within exemptions adopted by the Commission.

Respectfully submitted,

/s/ Margaret L. Tobey
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Dated: November 17, 2004

(Footnote continued from previous page.)

"the preemptive reach of the Telecommunications Act over state laws which restrict interstate communications," at least for conflicts preemption purposes. Slip op. at 21.

CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that the foregoing **REPLY COMMENTS OF HYPOTENUSE, INC./SURVEYUSA, INC.** were delivered, via U.S. Postal Mail, on this 17th day of November, 2004, to the following:

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Federal Communications Commission
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January 26, 1998

Delegate Ronald A. Guns
House of Delegates
161 Lowe Office Building
Annapolis, Maryland 21401-1991

Dear Mr. Guns:

I am writing in response to your August 1, 1997, letter to Regina Keeney, former Chief, Common Carrier Bureau, requesting that the Commission clarify whether the State of Maryland may enact laws that would apply to all commercial telemarketing calls received within the State, only to those calls that originate within the State or only to wholly intrastate calls. You asked whether the Commission had considered adopting rules that would require telemarketers utilizing automated dialing systems to be on the telephone line and ready to respond to call recipients at the time the subscriber answers. Lastly, you asked whether the Commission has considered adopting a rule that would require telemarketers to inform all call recipients that they had the option to be placed on a do-not-call list.

On December 20, 1991, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), Public Law 102-243, which amended the Communications Act of 1934[1] by adding a new section 47 U.S.C. § 227. The TCPA mandated that the Commission implement regulations to protect the privacy rights of citizens by restricting the use of the telephone network for unsolicited advertising. On September 17, 1992, the Commission adopted a *Report and Order* (CC Docket 92-90, FCC No. 92-443),[2] which established rules governing unwanted telephone solicitations and regulated the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines.

"Whether a state may impose requirements on interstate communications depends on an analysis under the Supremacy Clause of Article VI of the U.S. Constitution."[3] Under the

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[1] 47 U.S.C. §§ 151 *et seq.* ("Communications Act" or "the Act").

[2] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 7 FCC Rcd 8752 (1992) (*Report and Order*).

[3] *Operator Services Providers of America Petition for Expedited Declaratory Ruling, Memorandum Opinion and Order*, 6 FCC Rcd 4475, 4476 (1991) (*Operator Services*

Supremacy Clause, a state may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation.[4] "The key inquiry is whether Congress intended to supplant state laws on the same subject."[5] Section 2(a)[6] of the Act grants the Commission jurisdiction over all interstate and foreign communications. Interstate communications are defined as communications or transmissions between points in different states.[7] Section 2(b)(1)[8] of the Act generally reserves to the states jurisdiction over intrastate communications.[9] Intrastate communications are defined as communications or transmissions between points within a state.[10]

The Communications Act, specifically section 227 of the Act, establishes Congress' intent to provide for regulation exclusively by the Commission of the use of the interstate telephone network for unsolicited advertisements by facsimile or by telephone utilizing live solicitation, autodialers, or prerecorded messages. The TCPA also preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or automated artificial or prerecorded voice messages.[11] By its terms, the TCPA shall not "preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits (A) the use of telephone facsimile machines or other electronic devises to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations."[12]

In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however, precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland

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Memorandum Opinion and Order).

[4] *Id.*

[5] *Id.*

[6] 47 U.S.C. § 152(a).

[7] 47 U.S.C. § 153(22).

[8] 47 U.S.C. § 152(b)(1).

[9] *Operator Services Memorandum Opinion and Order*, 6 FCC Rcd at 4476.

[10] Intrastate means remaining entirely within the boundaries of a single state. NEWTON'S TELECOM DICTIONARY, 11th Edition, at 320. Intrastate telephone calls are calls that originate and are received within the boundaries of a single state.

[11] 47 U.S.C. § 227(d) and e(1); *see Report and Order*, 7 FCC Rcd at 8781.

[12] 47 U.S.C. § 227(e)(1); *see Report and Order*, 7 FCC Rcd at 8781.

can not apply its statutes to calls that are received in Maryland and originate in another state or calls that originate in Maryland and are received in another state.

In response to your second inquiry, the Commission stated that there are separate privacy concerns associated with artificial or prerecorded message solicitations as opposed to live solicitations, which include calls made by autodialers that deliver calls to live operators.[13] The Commission did not consider adopting rules that would require telemarketers utilizing automated dialing systems to be on the telephone line and immediately ready to respond to customers at the time of a call. No provision regarding this concern is reflected in the language of the TCPA. In addition, no comments or petitions suggesting such a requirement were filed before the Commission during the rulemaking proceeding implementing the TCPA. Nothing in our rules, however, would limit the state of Maryland from including this type of provision in its telemarketing statutes applicable to calls between points in the state of Maryland.

In its *Report and Order*, the Commission considered a number of options that proposed to place a variety of requirements upon telemarketers, including requiring telemarketers to inform subscribers of their right to be placed on do-not-call lists. Although the Commission selected the establishment of company-specific do-not-call lists as the most effective alternative to protect residential subscribers from unwanted live solicitations, it did not require telemarketers to notify telephone subscribers of their right to be placed on do-not-call lists.[14] The Commission noted that it would disseminate public notices and work with consumer groups, industry associations, local telephone companies, and state agencies to ensure that consumers are fully informed of their rights under the TCPA. For example, the Commission released a public notice on January 11, 1993, a Consumer Alert in March 1995, and a Consumer News brochure in June 1997, explaining to consumers what actions they can take to reduce the number of unsolicited calls and facsimiles that they receive and detailing consumer rights under the TCPA and the Commission's rules. No additional petitions have been filed requesting that the Commission require telemarketing companies to inform consumers of their right to be placed on the companies' do-not-call lists.

Enclosed is a copy of a Consumer News bulletin addressing consumer rights under the TCPA; a copy of the *Report and Order*, *Memorandum Opinion and Order*,[15] and *Order on*

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[13] *Report and Order*, 7 FCC Rcd at 8756-57.

[14] *Report and Order*, 7 FCC Rcd at 8764-68.

[15] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Memorandum Opinion and Order*, 10 FCC Rcd 12391 (1995) (*Memorandum Opinion and Order*).

Further Reconsideration[16] published by the Commission implementing the TCPA; a copy of 47 C.F.R. § 64.1200, regulations implemented by the Commission regarding the TCPA; and a copy of the TCPA. If you have further questions, please contact Renee Alexander at (202) 418-2497.

Sincerely,

Geraldine A. Matise

Geraldine A. Matise
Chief, Network Services Division
Common Carrier Bureau

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[16] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Order on Further Reconsideration*, CC Docket-92-90, FCC 97-117 (rel. Apr. 10, 1997) (*Order on Further Reconsideration*).